August 13, 2019

The Honorable Derek W. DeVine
Seneca County Prosecuting Attorney
79 S. Washington Street
Tiffin, Ohio 44883

SYLLABUS: 2019-028

1. R.C. 9.48(B) does not authorize a political subdivision to acquire construction services through participation in a contract entered into by another political subdivision.

2. Unit prices in a contract entered into under R.C. 167.081 may be expressed in any reasonable manner, so long as the contract complies with all applicable Ohio laws, including Ohio's Prevailing Wage Law, R.C. 4115.03-.16.

3. R.C. 167.081 authorizes the entry into a per unit contract only for the purpose of acquiring services related to the repair, enlargement, improvement, or demolition of existing buildings or structures.

4. Unit prices and bids for the services listed in R.C. 167.081 are subject to the requirements of Ohio's Prevailing Wage Law, R.C. 4115.03-.16, if the overall project cost exceeds the threshold above which prevailing wage must be paid. Under R.C. 4115.03(D) and R.C. 4115.05, the prevailing wage rates on a public improvement project initiated under R.C. 167.081 are based on the prevailing wages in the county in which the project is performed and located.

5. Under R.C. 167.05, a regional council of governments has authority to hire a private, third-party procurement administrator to manage the implementation of a per unit contract entered into pursuant to R.C. 167.081. The privilege of utilizing the contract may not extend to the member subdivisions of the regional council, unless the contract is entered into by and between the regional council of governments and the procurement administrator. A regional council of governments is ultimately responsible for compliance with Ohio law, including

compliance with all applicable public bidding and prevailing wage requirements.

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August 13, 2019

OPINION NO. 2019-028

The Honorable Derek W. DeVine
Seneca County Prosecuting Attorney
79 S. Washington Street
Tiffin, Ohio 44883

Dear Prosecutor DeVine:

You have requested an opinion regarding the authority of a regional council of governments ("council" or "COG") organized under R.C. Chapter 167 to contract for construction services.[1] Specifically, you ask the following questions, which we have rephrased for ease of discussion:

1. Does R.C. 9.48(B)(1) authorize a political subdivision such as a regional council of governments to acquire construction services through participation in a contract entered into by another political subdivision?

2. What constitutes a "unit price" or "unit basis" for materials, labor, services, overhead, or profit under R.C. 167.081?

3. Does R.C. 167.081 authorize a regional council of governments to enter into a unit price for the construction of new buildings or structures?

4. Are unit prices and bids for construction services under R.C. 167.081 subject to the requirements of Ohio's Prevailing Wage Law, R.C. 4115.03-.16, if the overall project cost is above the statutory threshold? If so, how

[1] "[T]he Attorney General generally refrains from advising a county prosecutor with respect to the powers of a regional council of governments." 2012 Op. Att'y Gen. No. 2012-026, at 2-225. However, your question, in part, involves the authority of the board of county commissioners of Seneca County, which is entitled to your legal counsel under R.C. 309.09. Therefore, your question involves duties of your office about which we may advise you under R.C. 109.14. *See id.*

should the unit pricing for labor be expressed in a contract entered into under R.C. 167.081?

5. May a third-party procurement administrator be added to a contract properly entered into under R.C. 167.081 to oversee the administration of the contract? If so, at what point in time may the procurement administrator be given authority to oversee the administration of the contract?

For your last question, you describe a hypothetical situation in which County A has entered into a contract with procurement administrator B. County A then seeks to join a regional council of governments and extend the benefits of its contract with the procurement administrator to the council's member subdivisions under R.C. 167.081. You note that "[t]he process that the COG and procurement administrator propose to use to adopt construction contracts does not follow the exact requirements of O.R.C. § 167.081."[2]

Regional Council of Governments

A regional council of governments is formed when governing bodies of various political subdivisions, such as counties and cities, enter into an agreement with each other to establish a regional council consisting of those political subdivisions. R.C. 167.01. A regional council of governments may perform any of the powers listed in R.C. 167.03, which include studying area problems that are common to two or more members of the council and promoting "cooperative agreements and contracts among its members or other governmental agencies and private persons, corporations, or agencies." R.C. 167.03(A)(1), (4). A regional council of governments "shall have the power to . . . perform such other functions and duties as are performed or capable of performance by the members and necessary or desirable for dealing with problems of mutual concern." R.C. 167.03(C). The proper officials of a political subdivision may contract with a regional council of governments to receive any service from the council or to provide any service to such council. R.C. 167.08. "Such contracts may also authorize the council to perform any function or render any service in behalf of such" political subdivisions that those political subdivisions may perform or render. *Id.*

We have previously noted, however, the following limitation on the power of a regional council of governments to act on behalf of its member political subdivisions:

> When a political subdivision enters into an agreement under R.C. 167.03(C) or 167.08 with a regional council of governments of which it is a member, whereby the regional council of governments assumes certain duties and

[2] We assume, for the purpose of this opinion, that a third-party procurement administrator is a private company that administers a contract in exchange for a fee that is a percentage of the overall contract price or some other negotiated rate.

> responsibilities of the member political subdivision, the regional council of governments must comply with all statutory requirements imposed upon the member political subdivision in the performance of such duties and responsibilities.

1982 Op. Att'y Gen. No. 82-103 (syllabus). "It is clear from the language of R.C. 167.03(C) that a regional council of governments, acting on behalf of its members, may carry out only such 'functions and duties as are performed or capable of performance by the members.'" *Id.* at 2-282 (quoting R.C. 167.03(C)). A regional council of governments may, therefore, "perform functions and duties on behalf of a member political subdivision only within the statutory constraints which define the manner in which that subdivision could perform the same functions and duties." *Id.* at 2-283; *see also* 1986 Op. Att'y Gen. No. 86-068, at 2-376. Therefore, "[a] council . . . is given no 'governmental powers' that are not provided to its members." 1977 Op. Att'y Gen. No. 71-010, at 2-22; *see also* 2006 Op. Att'y Gen. No. 2006-008, at 2-70 (it is firmly established that a regional council of governments "cannot do more than its individual members can do" and a member cannot do through a regional council of governments "anything that it could not otherwise do").

The principle that a regional council of governments must comply with all the statutory requirements imposed upon a member political subdivision in the performance of duties on behalf of the member subdivision "operates as a means of ensuring that a regional council of governments is not used to avoid requirements with which individual members would be required to comply." 1998 Op. Att'y Gen. No. 98-004, at 2-25. The principle "originates in the concept that the authority of a regional council of governments to act on behalf of its members is derived from its members and cannot exceed the authority that the members have." *Id.*

***Question One*: Joint Purchasing Programs under R.C. 9.48**

Your first question is whether a regional council of governments may contract for construction services under the joint purchasing authority granted to political subdivisions under R.C. 9.48. In relevant part, R.C. 9.48 provides that a political subdivision may "[p]ermit one or more other political subdivisions to participate in contracts into which it has entered for the acquisition of *equipment, materials, supplies, or services,* and may charge such participating political subdivisions a reasonable fee to cover any additional costs incurred as a result of their participation." R.C. 9.48(B)(1) (emphasis added). A regional council of governments is considered a political subdivision for purposes of R.C. 9.48. *See* R.C. 9.48(A); R.C. 2744.01(F). A political subdivision that acquires equipment, material, supplies, or services "through participation in a contract of another political subdivision" is exempted from competitive selection requirements otherwise required by law, if certain conditions are met. *See* R.C. 9.48(C). You ask specifically whether the word "services" in R.C. 9.48 includes "construction" or "construction services."

Neither "construction" nor "construction services" appears in the list of items that may be the subject of a joint purchasing program under R.C. 9.48. The terms, however, appear in

myriad other locations in the Revised Code. *See, e.g.*, R.C. 123.281(B); R.C. 307.674(A)(3); R.C. 749.37; R.C. 2307.89(D)(3); R.C. 5120.105(A); R.C. 5501.73(B)(1). The terms "construction" and "construction services," or variations thereof, even appear elsewhere within the same Revised Code Chapter as R.C. 9.48. *See* R.C. 9.32; R.C. 9.33; R.C. 9.76(B). The General Assembly has, therefore, included the terms "construction" and "construction services" elsewhere in the Revised Code. It logically follows that those terms are to be differentiated from the general term "services," which appears in R.C. 9.48.

It is well established that where the General Assembly has enacted particular language in one statute and different language in another statute, it is presumed that different results were intended. *See Metro. Sec. Co. v. Warren State Bank*, 117 Ohio St. 69, 76, 158 N.E. 81 (1927); *State ex rel. Enos v. Stone*, 92 Ohio St. 63, 66, 110 N.E. 627 (1915). If the legislature intended to include "construction services" in R.C. 9.48, it could have used language to do so. R.C. 9.48, however, does not contain the terms "construction" or "construction services." Consequently, we conclude that the General Assembly did not intend to include construction or construction services among the list of items, which a political subdivision may secure under the purchasing authority described in R.C. 9.48. As noted above, a regional council of governments is a political subdivision for the purposes of R.C. 9.48. R.C. 9.48(A); R.C. 2744.01(F).

***Question Two*: Unit Pricing under R.C. 167.081**

Your second question is what constitutes a "unit price" or "unit basis" for materials, labor, services, overhead, or profit under R.C. 167.081. You further ask whether a unit price may be a stated percentage markup of the cost of materials; whether the unit price for labor may be the stated labor rate and fringe benefit rate; and whether the unit price may be a price per square foot to construct a particular structure.

R.C. 167.081 authorizes a regional council of governments to enter into a contract on a per unit basis for certain aspects of work performed on a building or structure, if the contract was awarded pursuant to a competitive bidding procedure applicable to one of the council's member subdivisions. The statute provides, in part, as follows:

> A regional council may enter into a contract that *establishes a unit price for, and provides upon a per unit basis, materials, labor, services, overhead, profit, and associated expenses for the repair, enlargement, improvement, or demolition of a building or structure* if the contract is awarded pursuant to a competitive bidding procedure of a county, municipal corporation, or township or a special district, school district, or other political subdivision that is a council member; a statewide consortium of which the council is a member; or a multistate consortium of which the council is a member.

R.C. 167.081 (emphasis added).[3] The terms "unit price" and "per unit basis," however, are not defined in R.C. 167.081 or in any other statutory provision. The term "unit pricing" has been defined elsewhere as "[a] system in which contract items are priced per unit rather than on the basis of a flat contract price." *Black's Law Dictionary* 1676 (9th ed. 2009); *Black's Law Dictionary* 1534 (6th ed. 1990). "Per unit contracts are contracts under which amounts due are determined according to the number of units provided." 1999 Op. Att'y Gen. No. 99-049, at 2-304 to 2-305; *see also* 1987 Op. Att'y Gen. No. 87-069, at 2-429 (a per unit contract is a contract that "sets forth a price for each unit of a particular item and provides that payment will be made on that basis for such number of units as may be provided").

R.C. 167.081 does not provide the manner in which unit pricing must be expressed in a per unit contract entered into by a regional council of governments. "Where authority is given to do a specified thing, but the precise mode of performing it is not prescribed, the presumption is that the legislature intended the party might perform it in a reasonable manner." *Jewett v. Valley Ry. Co.*, 34 Ohio St. 601, at 608 (1878); *see also State ex rel. Preston v. Ferguson*, 170 Ohio St. 450, 459, 166 N.E.2d 365 (1960) ("[w]here a statute clearly confers power to do a certain thing without placing any limitation as to the manner or means of doing it, and no statute can be found prescribing the exact mode of performing that duty or thing, the presumption is that it should be performed in a reasonable manner *not in conflict with any law of the state*") (emphasis in original). Therefore, unit pricing for materials, labor, overhead, profit, and associated expenses under a contract entered into pursuant to R.C. 167.081 may be expressed in any reasonable manner not in conflict with other Ohio laws.

You ask whether the unit price under a contract entered into pursuant to R.C. 167.081 may be a "price per square foot to construct a particular structure." The answer to this question depends on whether expressing the "unit price" in terms of price per square foot is a reasonable means of exercising the authority granted to a regional council of governments to enter into a per unit contract under R.C. 167.081. The same analysis applies to the unit price for labor being "a stated labor rate and fringe benefit rate," and the unit price for materials, overhead or profit being "a stated percentage markup of the cost of materials." The ultimate determination of the reasonableness of each of the methods of expressing "unit price" must be made by the courts. *See* 2016 Op. Att'y Gen. No. 2016-021, at 2-229 to 2-230 ("[w]hile we may surmise what a court would do if a case [were] presented that necessitated consideration of Ohio Const. art. II, §§ 34 and 34a in the context of minimum wage, there is no way for us to predict with a reasonable degree of certainty how the court would decide the question"); 1999 Op. Att'y Gen. No. 99-011, at 2-91. As such, we decline to express an opinion on the reasonableness of particular methods of expressing "unit price" under a per unit contract.

Therefore, we conclude that "unit prices" in contracts entered into pursuant to R.C. 167.081 may be expressed in any reasonable manner. It is important to note, however, that such

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[3] R.C. 167.081 imposes a two-week public notice requirement before a regional council may receive bids for a unit price contract. R.C. 167.081 (paragraph 2).

prices must comply with all other applicable Ohio laws and regulations. This includes compliance with Ohio's Prevailing Wage Law, *see* R.C. 4115.03-.16, whenever the overall project cost exceeds the statutory threshold above which prevailing wage must be paid.[4] *See infra*, note 6. We discuss prevailing wage requirements more fully below.

***Question Three*: R.C. 167.081 Application to New Construction**

Your third question is whether a regional council of governments may take advantage of the unit pricing and competitive bidding standards under R.C. 167.081 when entering into a contract for "new construction." As outlined above, R.C. 167.081 authorizes a regional council of governments to enter contracts on a per unit basis for "materials, labor, services, overhead, profit, and associated expenses for the *repair, enlargement, improvement, or demolition of a building or structure*[.]" (Emphasis added.) The General Assembly did not include "construction" or "new construction" in the list of actions as to which a regional council of governments may enter into a unit basis contract. "Under the general rule of statutory construction *expressio unius est exclusio alterius*, the expression of one or more items of a class implies that those not identified are to be excluded." *State v. Droste*, 83 Ohio St. 3d 36, 39, 697 N.E.2d 620 (1998), *cert. denied*, 526 U.S. 1145 (1999).

Here, the legislature has listed a number of actions, all of which may be characterized by work performed on an *existing* building or structure. The list does not include construction of a new building or structure. Moreover, as noted above, where the General Assembly has wished to use the terms "construction" or "construction services," it has done so expressly. *See, e.g.*, R.C. 9.32; R.C. 9.33; R.C. 9.76(B); R.C. 123.281(B); R.C. 307.674(A)(3); R.C. 749.37; R.C. 2307.89(D)(3); R.C. 5120.105(A); R.C. 5501.73(B)(1). The absence of the terms from R.C. 167.081 is compelling evidence that the General Assembly did not intend to include "construction" among the list of items for which a regional council of governments may contract on a per unit basis. *See Metro. Sec. Co. v. Warren State Bank*, 117 Ohio St. 69, 76, 158 N.E. 81 (1927). By its express terms, R.C. 167.081 limits the authority of a council of governments to contract on a per unit basis to the repair, enlargement, improvement, or demolition of an existing building or structure.[5]

This conclusion is supported by R.C. 167.10. That statute authorizes a "qualifying" regional council to "acquire, *construct, and otherwise improve* real and personal property to be used by or for the benefit of the qualifying council or one or more of its members. R.C. 167.10(B) (emphasis added). A qualifying regional council must be composed "primarily of

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[4] In determining whether prevailing wage rates must be paid on a public improvement project, different threshold amounts apply depending on whether the project is "new construction" or "renovation." *See* R.C. 4115.03(B)-(C).

[5] We do not address in this opinion the scope of the meaning of the phrase "building or structure" as that phrase is used in R.C. 167.081.

city, local, and exempted village school districts," or a combination of such districts, and the council must be an information technology center. *See* R.C. 167.10(A)(1); R.C. 3301.075. If a council meets those requirements, then it is a "qualifying" council under R.C. 167.10 and is authorized to construct *and* improve real property. R.C. 167.10, therefore, uses language which indicates that a qualifying council may construct new buildings and structures, rather than merely improve existing structures. As such, the existence of R.C. 167.10 is additional evidence that the General Assembly did not intend to authorize a non-qualifying regional council to enter into a per unit contract under R.C. 167.081 for new construction because R.C. 167.10 contains the term "construct," while R.C. 167.081 omits the term. We find no provision of R.C. Chapter 167, however, which precludes a council of governments from otherwise utilizing the resources of the council or entering into agreements with COG members for the completion of new construction projects.

***Question Four*: Impact of Ohio's Prevailing Wage Law on R.C. 167.081 Unit Pricing**

Your fourth question concerns the impact of Ohio's Prevailing Wage Law, set forth in R.C. Chapter 4115, on the unit pricing contractual authority given to regional councils of governments for the types of projects listed in R.C. 167.081. Specifically, you ask whether unit prices and bids for contracts under R.C. 167.081 are subject to the requirements of Ohio's Prevailing Wage Law if the price of the project exceeds the threshold amount above which the prevailing wage statutes apply. In relation to this question, you ask, essentially, how the prevailing wage rates for a given project are determined when multiple counties are part of a regional council that benefits from the project.

Ohio's Prevailing Wage Law requires public authorities and contractors to pay the prevailing wage rate in a particular locality to laborers, workers, and mechanics on public improvement projects, the overall cost of which exceeds the applicable statutory threshold. R.C. 4115.03(B)-(C); R.C. 4115.05. The overall project cost is calculated based on "the prevailing wage rates in the locality *at the time the project is to be let out for bidding*." 9C Ohio Admin. Code 4101:9-4-17(A) (emphasis added). The prevailing wage rate is compiled on the basis of the salary and fringe benefits payable to a particular classification of laborers, workers, or mechanics, and is based on the common wage rates in collective bargaining agreements in the county in which the public improvement project is based. R.C. 4115.03(D)-(E); R.C. 4115.05; *see also State ex rel. Associated Builders & Contractors of Central Ohio v. Franklin Cnty. Bd. of Comm'rs*, 125 Ohio St. 3d 112, 2010-Ohio-1199, 926 N.E.2d 600, at ¶ 10 (Ohio's prevailing wage laws "require contractors and subcontractors for public works projects to pay laborers and mechanics the 'prevailing wage' in the locality where the project is to be performed").

A public authority includes any political subdivision of the state, "authorized to enter into a contract for the construction of a public improvement or to construct the same by the direct employment of labor." *See* R.C. 4115.03(A). The reconstruction, enlargement, alteration, repair, remodeling, renovation, or painting of an existing building or structure qualifies as a public improvement project if the overall project cost exceeds the statutory threshold. *See* R.C. 4115.03(B)(2), (C). A project is constructed "for a public authority" if a contract between the

public authority and the constructing entity is the "animating force" for the project. *United States Corr. Corp. v. Ohio Dep't of Indus. Relations*, 73 Ohio St. 3d 210, 219, 652 N.E.2d 766 (1995). To be constructed for a public authority, the public authority must "receive the benefit of the construction, either through maintaining a possessory or property interest in the completed project or through the use of public funds in the construction of the project." *Episcopal Ret. Homes v. Ohio Dep't of Indus. Relations*, 61 Ohio St. 3d 366, 370, 575 N.E.2d 134 (1991). *Accord Zurz v. 770 W. Broad AGA, L.L.C.*, 192 Ohio App. 3d 521, 2011-Ohio-832, 949 N.E.2d 595, at ¶¶ 10, 17-19. "[B]oth the public authority and the contractor are charged with ensuring compliance with the prevailing wage provisions when entering into a public improvement contract." *Ohio Asphalt Paving, Inc. v. Ohio Dep't of Indus. Relations*, 63 Ohio St. 3d 512, 516, 589 N.E.2d 35 (1992). In general, Ohio's prevailing wage laws "require contractors and subcontractors for public works projects to pay laborers and mechanics the 'prevailing wage' in the locality where the project is to be performed." *State ex rel. Associated Builders & Contractors of Central Ohio v. Franklin Cnty. Bd. of Comm'rs*, 125 Ohio St. 3d 112, 2010-Ohio-1199, 926 N.E.2d 600, at ¶ 10.

As applied here, a regional council of governments is a public authority required to pay prevailing wages on a public improvement project, and a project is "for a public authority," if the project is funded in part by public moneys or if the regional council retains a possessory or property interest in the construction. *See* R.C. 4115.03(A); R.C. 167.06(A)-(C) (a regional council of governments may be funded through its member subdivisions, state and federal government grants, or private and civic sources); *Episcopal Ret. Homes*, 61 Ohio St. 3d 366, at 370. A regional council is authorized to contract for the construction of public improvement projects, namely the repair and improvement of existing buildings or structures. *See* R.C. 4115.03(A); *see also* R.C. 167.081. Therefore, if, under a per unit contract, the repair and improvement of an existing building or structure involves the expenditure of public moneys or benefits the regional council, and the overall project cost exceeds the statutory threshold, the regional council of governments is obligated to pay prevailing wages on such project.

You ask whether, in relation to a contract entered into under R.C. 167.081 for which prevailing wages must be paid, the "unit price" for labor may be expressed as the stated prevailing wage rate. Every public authority that is authorized to enter into contracts for the construction of public improvement projects is obligated to "have the director of commerce determine the prevailing rates of wages . . . for the class of work called for by the public improvement, in the locality where the work is to be performed." R.C. 4115.04(A)(1). Except for contracts administered by the Ohio Department of Natural Resources, the schedule of prevailing wages for a given project is to "be attached to and made part of the specifications for the work, and shall be printed on the bidding blanks where the work is done by contract." *Id.*; *see also* R.C. 4115.04(A)(2). Whenever a public authority enters into a contract for the construction of a public improvement, "the contract executed between the public authority and the successful bidder shall contain a provision requiring the successful bidder and all his subcontractors to pay a rate of wages which shall not be less than the rate of wages so fixed." R.C. 4115.06. "The successful bidder and all his subcontractors shall comply strictly with the wage provisions of the contract." *Id.*

R.C. 167.081 must be read *in pari materia* with the requirements of Ohio's prevailing wage law. *State v. Moaning*, 76 Ohio St. 3d 126, 128, 666 N.E.2d 1115 (1996) ("[i]t is a well-settled rule of statutory interpretation that statutory provisions be construed together and the Revised Code be read as an interrelated body of law"); *State ex rel. Herman v. Klopfleisch*, 72 Ohio St. 3d 581, 585, 651 N.E.2d 995 (1995). The authority granted to a regional council of governments to enter into per unit contracts for certain types of work does not abrogate the requirements of Ohio's Prevailing Wage Law. As such, when the overall cost of a public improvement project exceeds the statutory threshold above which prevailing wages must be paid,[6] the "unit price" for labor under R.C. 167.081 means the prevailing wage rate for the relevant class of work on the project.

Finally, you inquire about the appropriate prevailing wage rate to be applied to a public improvement project initiated under R.C. 167.081 in light of a regional council's membership being composed of multiple counties. Prevailing wages are determined in relation to the locality in which the public improvement project is situated. R.C. 4115.03(D); R.C. 4115.05. "Locality" means the county in which the physical work upon the public improvement takes place. R.C. 4115.03(D). Therefore, under an R.C. 167.081 contract, the appropriate prevailing wage rate for each class of work is the prevailing wage rate in the county in which the project is performed and located.

***Question Five*: Third-Party Procurement Administrator**

Your fifth question asks whether a contract awarded pursuant to R.C. 167.081 through a competitive bidding process applicable to a regional council member subdivision may be amended to add a third-party procurement administrator as the contract holder and extended to other council members to use without competitive bidding. We understand third-party procurement administrator to refer to a private company that manages the implementation of a contract awarded pursuant to R.C. 167.081 in exchange for a fee from the members of a regional council of governments.[7]

A regional council of governments is created by statute, and has only those powers expressly provided, or necessarily implied, by law. *See* 2012 Op. Att'y Gen. No. 2012-026, at 2-226 to 2-227. Under the Revised Code, a regional council is authorized to "employ such staff and contract for the services of such consultants and experts . . . as it deems necessary and

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[6] As noted above, whether a project exceeds the statutory threshold above which prevailing wages must be paid is calculated "based on the prevailing wage rates in the locality at the time the project is to be let out for bidding[.]" 9C Ohio Admin. Code 4101:9-4-17(A).

[7] We note that a private company has no authority to form or be a part of a regional council of governments. Rather, only the governing bodies of two or more political subdivisions, such as counties, municipal corporations, and townships, have the authority to join together to form a regional council of governments. *See* R.C. 167.01; R.C. 167.02(A).

appropriate in the manner and under procedures established by the by-laws of the council." R.C. 167.05. Moreover, nothing in the Revised Code prohibits a regional council of governments from hiring a third-party administrator to oversee the management of a contract entered into under R.C. 167.081. Therefore, we are of the opinion that R.C. 167.05 authorizes a regional council of governments to hire a third party to administer a per unit contract entered into under R.C. 167.081. However, the regional council of governments retains ultimate responsibility for compliance with all applicable Ohio laws. For example, the regional council of governments must be the entity to award the per unit contract under R.C. 167.081 and comply with all public bidding requirements. Moreover, if the overall project costs exceeds the threshold above which prevailing wage must be paid, the council and all contractors on the project are responsible for compliance with R.C. 4115.03-.16. An employee of the regional council of governments, and not the third-party procurement administrator, must serve as the prevailing wage coordinator on a public improvement project. *See* R.C. 4115.071(A) (each contracting public authority shall "designate and appoint one of its own employees to serve as the prevailing wage coordinator during the life of the contract"). A third-party administrator cannot perform these legal duties on behalf of the regional council of governments.

R.C. 167.081 states that a regional council may enter into a per unit contract "if the contract is awarded pursuant to a competitive bidding procedure of a [political subdivision] *that is a council member*." R.C. 167.081 (emphasis added). The phrase "that is a council member" places a restriction on a regional council's ability to obtain a per unit contract under R.C. 167.081. A regional council and its members may obtain the benefits of a per unit contract under R.C. 167.081 only if the contract is awarded under competitive bidding requirements applicable to a *current member* of the council. In other words, if a political subdivision enters into a competitively bid contract and *then* joins the regional council, a regional council cannot enjoy the benefits of the contract. The subdivision must already be a member of the council for the council's members to enjoy the per unit contracting authority provided under R.C. 167.081.

The hypothetical situation you describe in your letter does not comport with the above requirement. You write that County A wishes to enter into a contract with procurement administrator B and *then* join a regional council of governments to extend the benefits of the contract to the council's member subdivisions. Under this arrangement, County A is not a member of the council at the time of executing the contract with procurement administrator B. Therefore, the benefits of the contract cannot be extended to the regional council's members. If the benefits are to be extended to the council's members, the contract must be entered into by and between the regional council itself and the procurement administrator. To accomplish this end, the regional council of governments would be required to receive bids, pursuant to the competitive bidding procedures applicable to one of the council's member subdivisions, and to provide public notice once a week for at least two consecutive weeks before the date specified for receiving bids. *See* R.C. 167.081.

Finally, you have noted that R.C. 9.48 and R.C. 167.081 contain "piggyback" provisions that allow political subdivisions to take advantage of purchases made under a joint purchasing contract or per unit contract if the contract was awarded in compliance with competitive bidding

requirements. Each statute contains a provision authorizing other political subdivisions to take advantage of services obtained or goods purchased under a joint purchasing program (R.C. 9.48) or a per unit contract (R.C. 167.081), if certain conditions are met. For example, R.C. 9.48 authorizes a political subdivision to acquire equipment, material, supplies, or services, without being subject to competitive selection requirements generally imposed by Ohio law, by purchasing those items under a contract already entered into by another political subdivision. *See* R.C. 9.48(C). Two conditions apply. First, the original contract must have been awarded under applicable competitive bidding standards. Second, the political subdivision seeking to acquire items under the contract may not have already received bids for the contemplated acquisition. *See id.* R.C. 167.081 authorizes a similar piggyback arrangement under a per unit contract and imposes similar conditions on acquiring political subdivisions, but includes the additional condition that an acquiring subdivision must be a member of the regional council of governments.[8]

You write that R.C. 167.081 "seems to permit a COG to allow its public authority members to utilize a contract for [the services under R.C. 167.081] indefinitely." The piggyback provisions under R.C. 9.48 and R.C. 167.081 do not contain time restraints on the life of joint purchasing agreement or per unit contract, but should not be considered to allow for perpetual contracts. The law disfavors perpetual contracts. *See* R.C. 731.48 ("[t]he legislative authority of a municipal corporation shall not enter into any contract which is not to go into full operation during the term for which all the members of such legislative authority are elected"); *Korn v. Donahue*, 13 Ohio App. 2d 46, 57, 233 N.E.2d 600 (Montgomery County 1967); 1928 Op. Att'y Gen. No. 1896, p. 752, at 756; *see also Cox v. City of Pocatello*, 77 Idaho 225, 232, 291 P.2d 282 (1955) ("[w]e hold the general rule applicable, under the circumstances shown here, that the contract, having an indefinite term, must be construed as an existing contract, to remain in force at the will of the parties, or for a reasonable time"); *City of Barre v. Perry & Scribner*, 82 Vt.

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[8] The piggyback language is found in the third paragraph of R.C. 167.081, and provides as follows:

> A county, municipal corporation, or township and a special district, school district, or other political subdivision that is a council member may participate in a contract entered into under this section. Purchases under a contract entered into under this section are exempt from any competitive selection or bidding requirements otherwise required by law. A county, municipal corporation, or township or a special district, school district, or other political subdivision that is a member of the council is not entitled to participate in a contract entered into under this section if it has received bids for the same work under another contract, unless participation in a contract under this section will enable the member to obtain the same work, upon the same terms, conditions, and specifications, at a lower price.

301, 308, 73 A. 574 (1909); *City of Hazel Park v. Potter*, 169 Mich. App. 714, 719-723, 426 N.W.2d 789 (Mich. Ct. App. 1988).

Therefore, although R.C. 9.48 and R.C. 167.081 allow political subdivisions to avoid repeated competitive bidding by "piggybacking" onto a contract that already has been competitively bid, those statutes should not be interpreted as allowing a political subdivision to piggyback onto a contract in perpetuity. Otherwise, the policy rationales behind competitive bidding would be greatly diminished. A reasonable time limitation should be placed onto such piggyback agreements. What is reasonable under the circumstances is ultimately a factual question for the parties and, if necessary, the courts to resolve. *See* 2005 Op. Att'y Gen. No. 2005-001, at 2-7.

Conclusions

Based on the foregoing, it is our opinion, and you are hereby advised as follows:

1. R.C. 9.48(B) does not authorize a political subdivision to acquire construction services through participation in a contract entered into by another political subdivision.

2. Unit prices in a contract entered into under R.C. 167.081 may be expressed in any reasonable manner, so long as the contract complies with all applicable Ohio laws, including Ohio's Prevailing Wage Law, R.C. 4115.03-.16.

3. R.C. 167.081 authorizes the entry into a per unit contract only for the purpose of acquiring services related to the repair, enlargement, improvement, or demolition of existing buildings or structures.

4. Unit prices and bids for the services listed in R.C. 167.081 are subject to the requirements of Ohio's Prevailing Wage Law, R.C. 4115.03-.16, if the overall project cost exceeds the threshold above which prevailing wage must be paid. Under R.C. 4115.03(D) and R.C. 4115.05, the prevailing wage rates on a public improvement project initiated under R.C. 167.081 are based on the prevailing wages in the county in which the project is performed and located.

5. Under R.C. 167.05, a regional council of governments has authority to hire a private, third-party procurement administrator to manage the implementation of a per unit contract entered into pursuant to R.C. 167.081. The privilege of utilizing the contract may not extend to the member subdivisions of the regional council, unless the contract is entered into by and between the regional council of governments and the procurement administrator. A regional council of governments is ultimately responsible for compliance with Ohio law, including

compliance with all applicable public bidding and prevailing wage requirements.

Respectfully,

DAVE YOST
Ohio Attorney General